

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs at Knoxville January 27, 2009

WILLIAM BURT SMITH v. STATE OF TENNESSEE

Appeal from the Circuit Court for Franklin County
No. 12226 Allen Wallace, Senior Judge

No. M2008-01166-CCA-R3-PC - Filed July 31, 2009

The petitioner, William Burt Smith, appeals the Franklin County Circuit Court's denial of his petition for post-conviction relief from his conviction on one count of sale of a Schedule II controlled substance. On appeal, the petitioner argues that he received the ineffective assistance of counsel on direct appeal because his appellate counsel failed to file an adequate record regarding his sole issue on appeal: that the trial court erred by refusing to appoint counsel, thereby forcing him to proceed pro se. After reviewing the record, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

Phillip L. Davidson, Nashville, Tennessee, for the appellant, William Burt Smith.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Steven M. Blount, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Procedural History

The record reflects that in July 1998, the petitioner was indicted on one count of sale of a counterfeit controlled substance, one count of delivery of a counterfeit controlled substance, two counts of sale of a Schedule II controlled substance, and two counts of delivery of a Schedule II controlled substance. The early procedural history of the case was summarized by this court on direct appeal:

[At the time of his arraignment,] [t]he trial court found that the [petitioner] had sufficient income to retain counsel on August 19, 1998, and ordered him to pay \$750 per month if he wished to retain the court-appointed services of the public defender or [private counsel]. Approximately one month later on September 18, 1998, the trial court found that the [petitioner] was indigent and appointed [first trial counsel] to represent him without any partial reimbursement. [This attorney] filed a motion to withdraw as counsel on April 20, 1999. In the motion, [counsel] stated that “it was obvious that communication had broken down between your Movant and his client. The client accused your Movant of conspiring with the State of Tennessee and more specifically with [the] Assistant District Attorney . . . about his cases.” He also stated that the [petitioner] indicated that he did not trust him, and [the petitioner] was “doing things to make [the petitioner] hate [counsel].” The [petitioner] also “accused [counsel] of serious ethical violations and possible violations of Criminal Law.” [Counsel] stated that he could “no longer effectively represent the [petitioner].” He said that the [petitioner] had expressed a desire to hire an attorney from Murfreesboro. The record indicates that [counsel] filed several motions after the motion to withdraw. At some point, he was apparently allowed to withdraw, although the record does not indicate when that happened.

On April 26, 1999, the trial court again found that the [petitioner] was indigent and appointed [second trial counsel] to represent him. The court also ordered partial reimbursement of \$100 per month until \$1000 was paid. [Second counsel] filed several motions and then apparently withdrew. There is nothing else in the record concerning [second counsel]. On June 19, 2000, the trial court found that the [petitioner] was indigent and appointed [third trial counsel] to the case with no partial reimbursement. [Third counsel] filed motions in the case including a motion for speedy trial on October 23, 2000. A motion to withdraw as counsel was filed by [third counsel] on November 9, 2000. In the motion, he stated that the “person-to-person relationship between counsel and the [petitioner] has deteriorated to the point where counsel cannot function effectively as the [petitioner]’s legal representative.” The motion was denied. [Third counsel] filed another motion to withdraw on January 31, 2001, stating essentially the same grounds as the November motion. The trial court allowed [third counsel] to withdraw on February 2, 2001, “because of a conflict.”

State v. William Burt Smith, No. M2002-02988-CCA-R3-CD, 2004 WL 508485, at *1 (Tenn. Crim. App. Mar. 16, 2004) (not for citation), perm. app. denied (Tenn. Oct. 4, 2004).

The transcript of the hearing at which third counsel withdrew, which was not made part of the record on direct appeal, indicates that at the February 2, 2001 hearing, third counsel told the trial court, “There have been a couple of very heated situations between my client and [me]. . . . [T]here’s irreconcilable conflicts in our personalities to the point that I do not think I can represent him even with minimal degree of competence.” The petitioner told the trial judge that he intended to hire a

particular Nashville attorney. The trial court noted that if hired, this particular attorney would “make things easier for everybody.” After recounting the petitioner’s history with appointed counsel, summarized above, the trial court told the petitioner that “my preference would certainly be to see that you have counsel representing you in this matter[], but this case . . . is set for [trial] on March the 14th, and I need you to immediately let me know whether you make arrangements to hire [the Nashville attorney] or not.” Accordingly, the trial court set a February 15 hearing date at which the petitioner was to tell the court whether he had retained the attorney. The trial court added, “If you don’t hire [the Nashville attorney] you’re going to have to make the efforts to hire someone else, . . . I’ve got to keep this case moving. . . . I’m heading towards the point that either you get private counsel or you go forward representing yourself”

At a March 14, 2001 hearing, the trial court addressed the petitioner regarding their interaction on February 15, 2001:

Now you came back on February the 15th of 200[1], and I think at that point I don’t know whether we put that on the record or not, I don’t think we did. I think you just told me that you were trying to work something out with [the Nashville attorney]. You hadn’t been able to make it work, and you were facing a trial date, the third scheduled jury trial date of March the 14th, 2001, that’s today. I had looked through the file, I saw the motions were outstanding and I said, look, Mr. Smith, I’ve got to do something with your case. We’ve had three trial dates in this case. I’ve let all three trial dates get put off, and I told you to be back today.

This court summarized the remaining procedural history in this case as follows:

On March 14, 2001, the [petitioner] appeared before the court. The trial court questioned the [petitioner] about his intentions to retain counsel. The [petitioner] stated to the court that he did not currently have the money to retain counsel. He said that he was talking to [a particular attorney, not the one referenced at the February 2 hearing], but he wanted \$5000 to represent him, with \$2500 paid in advance. The [petitioner] indicated that he only had \$1500 “put away.” The court noted that the [petitioner] had made a \$100,000 bond and was ordered to pay \$750 per month toward his representation originally. . . . The trial court then stated that it was “making a factual finding based on the record that [it did not] have an obligation to provide [the petitioner] with appointed counsel for the trial in this case.” The court went on to state that the case was going to trial on the date set “come hell or high water” and “we’re going forward whether [the petitioner has] counsel or not.” The court then moved the trial date to July 6, 2001, and set the motion day as May 18, 2001, to “give [the petitioner] enough time that [he can] get the money together and get [an attorney] up here.”

On May 18, 2001, the [petitioner] arrived at the motion hearing without counsel. The trial court inquired whether the [petitioner] would have counsel for

trial. The [petitioner] indicated that he would have counsel in time for trial, but he was having a hard time coming up with enough money to pay him. The [petitioner] asked the court for two more weeks in order to get an attorney for the motion hearing. The court denied his request for more time and ordered him to proceed *pro se* at the motion hearing. The trial was continued from July 6, 2001, to September 13, 2001, because of the medical condition of the Assistant District Attorney. The [petitioner] arrived at the trial without counsel. He asked the court for a continuance, and the court denied his request. The [petitioner] was then required to proceed in the trial *pro se*.

William Burt Smith, 2004 WL 508485, at *1-2.

The petitioner was convicted of one count of sale of a Schedule II controlled substance, a Class C felony, and sentenced to eight years as a Range II, multiple offender. The petitioner retained counsel for his motion for new trial and on direct appeal. The sole issue argued on direct appeal was that the trial court denied the petitioner the right to counsel and forced him to proceed *pro se* at trial. This court, citing the lack of “any transcripts of apparent appearances by the [petitioner] on February 2, 2001, and February 15, 2001,” concluded that the petitioner had not prepared an adequate record to preserve the issue on appeal and affirmed the judgment of the trial court. *Id.* at *3.

In February 2005, the petitioner, through newly retained counsel, filed a timely petition for post-conviction relief. The petition alleged that he received the ineffective assistance of counsel on appeal because appellate counsel (1) failed to raise in this court the issues asserted in his motion for new trial, and (2) failed to preserve the issue regarding the petitioner’s right to counsel because appellate counsel failed to prepare an adequate record on appeal. The petitioner also argued that the trial court denied him the right to counsel at trial, with his being “forced to represent himself in a serious criminal trial . . . [rendering] his representation ineffective because he is a non-lawyer and cannot possibly adequately represent himself.” In December 2007, after numerous delays and the recusal of the trial judge, the petitioner, although still represented by counsel, filed a *pro se* amended petition for relief. In the amended petition, which incorporated the previous petition by reference, he argued that he received the ineffective assistance of counsel before trial and that he was incompetent to stand trial. The post-conviction court held an evidentiary hearing on March 31, 2008. Because the petitioner on appeal limits his argument to the issue of whether appellate counsel was ineffective for failing to prepare an adequate record regarding the right to counsel issue, we will limit our review of the testimony from the evidentiary hearing accordingly.

At the evidentiary hearing, appellate counsel testified that the petitioner retained him to represent the petitioner at the motion for new trial and on appeal. He said that he and the petitioner raised twelve issues in the motion for new trial but that after he and the petitioner “reviewed the record, we determined that the other issues that we had raised in the motion for a new trial weren’t strong enough to take up on appeal[.]” Counsel said that he believed that the issue of “whether or not it had been proper for him to be put to trial without a lawyer . . . was our strongest issue and that’s what I decided to appeal on.”

Counsel testified that in preparing the record on appeal, he submitted to the appellate court clerk's office "what we believed at the time was all of the transcripts relating to court appearances that [the petitioner] had made throughout the . . . three plus years that the matter had been pending." However, counsel acknowledged that this court's opinion referenced two dates—February 2, 2001, and February 15, 2001—"as dates where transcripts of the proceedings that occurred in the trial court [were] not included. Quite frankly, I don't know why they weren't." After reading the opinion, counsel reviewed the trial court record and discovered that there was a transcript from the February 2, 2001 hearing, a transcript which he did not include in the record. Regarding the February 15, 2001 date, counsel said that his investigation "revealed that there was no transcript . . . because there was no hearing that day." He said that the trial court had scheduled an appearance for that day at which the petitioner was to advise the trial judge whether he had retained counsel, "but I believe that the State was made aware, possibly the Court, that [the petitioner] had not retained counsel as of February 15th, so the Court did not have any proceedings that day, [and] there was nothing to transcribe."

Counsel said that the February 2, 2001 transcript contained "a chronological review on record by [the trial judge] of the difficulties that the Court and the other lawyers that preceded me had with [the petitioner] in representing him." He said that the proceedings were summarized in a written order¹ "which essentially recited some of [the judge's] findings . . . but it didn't lay [the petitioner] open like the transcript of those proceedings actually does." He said that in his opinion, if this court were to grant a delayed appeal, the transcript from the February 2 hearing would "hurt [the petitioner] worse than it's going to help him[.]"

Counsel summarized the trial court's addressing the issue regarding the petitioner's representation as follows:

If my memory serves me, . . . [the trial judge] was extremely careful in his dealings with William Burt Smith. He bent over backwards to try to help Mr. Smith and to give him the benefit of as much time as he needed to hire a lawyer, to do what he should, and then finally come September 13th, 2001, the trial date, [the judge's] patience with Mr. Smith had reached its limit and he made him go to trial without a lawyer. But even in the face of Mr. Smith not being represented, [the trial judge], if my memory serves me, tried to assure that Mr. Smith received a fair trial before the jury

The petitioner did not testify specifically regarding the failure of appellate counsel to file the February 2, 2001 transcript. Regarding his assertion that the trial court improperly caused him to proceed pro se, the petitioner testified that he was suspicious of how some of his earlier appointed attorneys "got off of" his case. He said that first trial counsel "asked [the assistant district attorney] to relieve him," and he denied filing a criminal complaint against first counsel. When asked whether

¹ This order does not appear in the record in the instant appeal. Counsel testified that the order did appear in the record on direct appeal.

he had made second trial counsel cry in the courtroom, the petitioner said that she “was crying in jail, too, telling me she couldn’t represent me.” He claimed that second counsel told him that he was “innocent,” that the State was “prosecuting [him] for something [he] may have done 20 or 30 years ago,” and that she had “never had a . . . person to represent like [him].” Accordingly, the petitioner claimed, second counsel told him that she could not represent him. The petitioner also suggested that third trial counsel told him that he could not represent the petitioner because the attorney believed the petitioner was innocent.

The petitioner testified that he did not recall much about the hearings the trial court held between February 2001 and the trial date. He acknowledged that he did tell the trial judge at some of the hearings that he was attempting to hire counsel. He said that he talked to several attorneys during that time but that he did not hire one. He said that on September 13, 2001, the opening day of trial, he had retained a lawyer—whose name he did not recall—but that the attorney was unavailable to appear in court that day. The petitioner claimed that he asked the trial judge for a continuance, but that “the judge came belligerent and sa[id], we[’re] through with this, we’re going to have a trial this morning, so you just prepare to represent yourself.”

The post-conviction court entered a written order denying the petition. The post-conviction court found that the trial court “went to great lengths” to give the petitioner the opportunity to have counsel for trial. Regarding the petitioner’s assertion that appellate counsel failed to preserve the denial of counsel issue on appeal, the post-conviction court found that the transcript of the February 2, 2001 hearing, which was not included in the record on direct appeal, did not advance the petitioner’s arguments regarding his denial of counsel assertion. In the court’s opinion, the transcript “further establish[ed] a history of delay by the [petitioner], and further substantiates the [trial] Court’s ultimate ruling that the [petitioner] should be required to proceed to trial pro se.” The court further opined that had appellate counsel filed the transcript with this court, “the attorney’s actions would not have changed the outcome” on direct appeal. The petitioner subsequently filed a timely notice of appeal.

ANALYSIS

The burden in a post-conviction proceeding is on the petitioner to prove his factual allegations by clear and convincing evidence. Tenn. Code Ann. §40-30-110(f). On appeal, we are bound by the trial court’s findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court’s conclusions as to whether counsel’s performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel’s performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockart v. Fretwell, 506 U.S. 364, 368-372 (1993). In other words, a showing that

counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The Strickland standard has been applied to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability means a probability sufficient to undermine confidence in the outcome." Id. Failure to satisfy either prong results in the denial of relief. Strickland, 466 U.S. at 697.

In this case, even assuming that appellate counsel's failure to include the February 2, 2001 transcript in the record on direct appeal constituted deficient performance, the petitioner has failed to establish that counsel's actions prejudiced him on direct appeal. The February 2001 transcript contains a circumspect statement by appointed counsel that after heated discussions with the petitioner he was unable to represent him. Additionally, during the hearing the trial court recounted the procedural history of the case. In this regard, the transcript of the February 2001 hearing essentially mirrors the March 14, 2001, transcript. We agree with the post-conviction court that the trial court gave the petitioner several opportunities to retain counsel after he experienced conflicts with his appointed counsel but that the petitioner refused to take advantage of these opportunities. At no time after the petitioner's final court-appointed attorney was allowed to withdraw in February 2001 did the petitioner ask the trial court to appoint new counsel. Instead, the petitioner simply continued to ask the trial court for more time to hire counsel.

At the time the petitioner was tried pro se, he had already had the benefit of at least three appointed attorneys, each of whom he had forced to withdraw by his behavior. Furthermore, the trial court had given the petitioner from February 2, 2001, to September 13, 2001, to hire counsel and warned the petitioner that he would proceed to trial pro se if he did not hire an attorney. The proof in this case shows that the petitioner was not denied his right to counsel. On the contrary, the petitioner refused assistance from his appointed attorneys and neglected to hire counsel in an effort to delay the prosecution. See State v. Carruthers, 35 S.W.3d 516, 594 (Tenn. 2000) ("an indigent criminal defendant may implicitly waive or forfeit the counsel by utilizing that right to manipulate, delay, or disrupt trial proceedings"); see also State v. Howard Hawk Willis, No. E2008-01105-CCA-R9-CD, 2009 WL 1929161, at *7 (Tenn. Crim. App. July 6, 2009) (defendant whose "intentional

conduct” caused seven different appointed attorneys to withdraw, despite trial court’s numerous warnings that the defendant’s “persistence in engendering conflicts that led to changes in counsel would result in his representing himself in the case,” forfeited and implicitly waived his right to counsel). In light of this evidence, there is not a reasonable probability that this court would have reversed the petitioner’s conviction on direct appeal had appellate counsel included the February 2001 transcript in the record. Accordingly, we deny the petitioner relief.

CONCLUSION

In consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

D. KELLY THOMAS, JR., JUDGE